

Registrar's Office
TransCanada Pipelines Tower
2600, 450 – 1st ST SW
Calgary AB T2P 5H1

TEL: (403) 297-2206
FAX: (403) 297-5294



COURT OF APPEAL OF ALBERTA

Registrar's Office
Law Courts Building
1A Sir Winston Churchill Square
Edmonton AB T5J 0R2

TEL: (780) 422-2416
FAX: (780) 422-4127

Case Management Officer: J. Cowen
Direct Line: (403) 297-5954
<https://albertacourts.ca>

Case Management Officer: B.J. McDevitt
Direct Line: (780) 427-8491
<https://albertacourts.ca>

August 17, 2017

Dino Bottos
Bottos Law Group
4th Floor, Fox One
10226 - 104 Street NW
Edmonton, AB T5J 1B8

Re: *R v. Barton*, 2017 ABCA 216

The panel has asked me to provide the following response to your letter of July 6, 2017 and Ms. Dartana's letter on behalf of the Crown dated July 10, 2017.

1. The reference to defence counsel's having asked "What's a man to do?" in para 260 of the Court's judgment was stated in the context of the Court's discussion of the issue of reasonable steps. The relevant pages of the transcript are enclosed at Tab 1.
2. With respect to after the fact conduct, the Court does not believe it misunderstood your position. The relevant pages of the transcript are enclosed at Tab 2.
3. The Court's reference to receiving "no assistance on this point" in para 303 was made in the context of the absence of adequate argument on the question of objective foreseeability and vitiation of apparent consent for public policy reasons.
4. A review of the factums confirms that on the Crown's grounds of appeal, both Crown and defence counsel addressed what remedies would be applicable. See also the relevant pages of the transcript at Tab 3. The Court is not bound by positions taken by either counsel as to remedy on a point of law. The Court is obliged to state the law correctly.

This response to your expressed concerns brings this matter to an end before this Court.

Sincerely,

Bobbi Jo McDevitt
Case Management Officer
Court of Appeal - Edmonton
/bjm

cc: Ms. Joanne Dartana
Appeals Branch, Alberta Justice and Solicitor General
3rd Floor, Bowker Building
9833 - 109 St
Edmonton, AB T5K 2E8

- 1 CHIEF JUSTICE FRASER: Ripped the hole of her vaginal wall.
2
- 3 MR. BOTTOS: We don't know her health.
4
- 5 CHIEF JUSTICE FRASER: I'm sorry. We have to look at this. You know,
6 just because the person is dead doesn't mean that we just assume that when someone
7 says, well, she consented to it all, it follows that she consented to it all.
8
- 9 MR. BOTTOS: You can't assume otherwise, because then
10 you'd be putting a reverse onus on the defence --
11
- 12 MR. JUSTICE WATSON: See, this is --
13
- 14 MR. BOTTOS: Or you would be forgiving the Crown --
15
- 16 MR. JUSTICE WATSON: No, fair enough.
17
- 18 MR. BOTTOS: -- for not proving an element of the offence.
19
- 20 MR. JUSTICE WATSON: I take your point, Mr. Bottos, but that's -- that's
21 where I -- as I say, I suggest that Parliament chose to enact the reasonable steps provision,
22 was specifically to address the intoxicated complainants who are unconscious and all this
23 sort of thing, in other words, the people who are mentally -- have difficulties. They put
24 reasonable steps in there to say, in a sense, a kind of a statutory wilful blindness, you
25 might say. They're saying that it isn't just positive evidence of lack of consent which is
26 required of the Crown.
27
- 28 The Crown can also say, we don't know -- as you're saying, we can't say whether there
29 was consent or not, it would have been consent or not, because the victim is now
30 deceased. So the next step is, does there not have to be evidence of reasonable steps, not
31 inferences or, oh, she's smiling or there's a -- you know, steps. You ask.
32
- 33 MR. BOTTOS: He had reasonable steps in spades, quite
34 frankly.
35
- 36 MR. JUSTICE WATSON: Because of what?
37
- 38 MR. BOTTOS: Well, you put it all together. He met her on
39 night number one, paid for the same sexual activity on night number one --
40
- 41 CHIEF JUSTICE FRASER: No, it wasn't the same.

1
2 MR. JUSTICE WATSON: It is not.
3
4 MR. BOTTOS: Yes, he did.
5
6 CHIEF JUSTICE FRASER: It's not the same.
7
8 MR. JUSTICE WATSON: He didn't kill her the first night. It's not the
9 same.
10
11 MR. BOTTOS: It's the same sexual activity, and you could
12 read the transcript. He said he hired her on night number one. She got on the bed. She
13 was fellating him. He puts his hand inside of her. He starts thrusting one finger, two
14 finger, three finger, four finger. Went up to the ridge of his knuckles on night number
15 one, and everything was fine. And less than 60 minutes later, they're leaving, holding
16 hands. Everything was fine. She gives him his -- she gives him her phone number. He
17 calls her. That's how he gets her back to the bar on night number two.
18
19 So by all accounts -- or by his account, I should say, everything looked pretty okay for
20 night number one, because she shows up on night number two, and she's willing to do it
21 again. On night number two, what happens? He says -- and this is in the transcript. First
22 of all, she comes to the bar. She's got her leg on his lap. She's having a drink with them,
23 that's Mr. Barton, Mr. Atkins in front of the barmaid, who was an independent witness
24 who the defence called. Everything was fine. She was not apparently so intoxicated as not
25 making sense or anything like that. She looked fully capacitated to those three parties,
26 including Barton and the other two witnesses.
27
28 Then it's last call, and so they go back to the apartment. He offers Mr. Atkins a piece of
29 the action. He says, no thank you. They continue on. Okay. They have another beer inside
30 the room 139 suite. After the beer or during that first beer he says, okay, Cindy, I've got
31 a busy day tomorrow; let's get to it. She says, "okay". Then she walks into the bathroom
32 fully clothed, walks out of the bathroom fully naked, and sits on the bed. So he's
33 negotiated the same price, \$60, and she goes in and she comes out naked.
34
35 So what's a man to think at that point? Is there really going to be a general problem of
36 consent? No. He's saying he -- what happened on night number one, which is the same
37 pattern as night number two, informs his expectations as to what was allowable on night
38 number two, based on night number one. So she gets on the bed. The same pattern occurs.
39 The only difference is that he goes a centimetre further or a centimetre or 2 further, past
40 his knuckle this time. And he went, instead of five to ten minutes, he said about ten
41 minutes, which is not far away --

- 1
2 MR. JUSTICE WATSON: Well, apart from his estimates, though, he did --
3 because there was more physical injury, you know, he had to be mistaken about the
4 difference between the two things.
5
- 6 MR. BOTTOS: Well, in fact, Dr. Ophoven, the defence expert I
7 called, had a plausible theory as to why the wound occurred on night number two.
8
- 9 MR. JUSTICE WATSON: Okay. What was it?
10
- 11 MR. BOTTOS: And that was that, on night number one, he --
12 or he could have, and she's speculating, because that's all we have here. But she
13 postulates a theory that --
14
- 15 MR. JUSTICE WATSON: She was already injured?
16
- 17 MR. BOTTOS: He -- unbeknownst to the both of them, she was
18 already bruised, that is her vaginal cavity had already become disrupted from night
19 number one. But he didn't know that, of course, and she didn't know that, of course.
20 She's coming back for another \$60, and then because of the weakening of that wall
21 caused by night number one, that night number two might not have required a
22 tremendous, incredible amount of force. It might have required some force indeed, but not
23 such force that he necessarily had to have a hostile sexual, violent animus. He could have
24 just been going a little farther and a little harder, unbeknownst to him, causing further and
25 further harm to her. And that's how you can have accident.
26
- 27 The criminal law is not just a man getting struck by lightning on a golf course to absolve
28 him of his sins. If you don't have the mens rea for a crime, you didn't commit a crime.
29
- 30 CHIEF JUSTICE FRASER: Okay. But if you exceeded the scope of the
31 consent, you did. And one thing we started with, you said, well, you can't start
32 speculating because the person is dead. Well, I suggest to you that there are enumerable
33 cases in which, in the context by the way of consensual fist fights, people have died. And
34 what the Courts have found is that the blow that was struck went beyond any of the
35 consent that was given.
36
- 37 MR. BOTTOS: Sure.
38
- 39 CHIEF JUSTICE FRASER: So you can certainly have consent given to sex,
40 but whether you consent to the kind of manual manipulation that includes ripping an
41 11-centimetre hole in your vaginal area is an entirely different question. And if a Court

- 1 MR. JUSTICE WATSON: Well, he could tell us before. One finger at a
2 time, two fingers at a time --
3
- 4 MADAM JUSTICE MARTIN: Yeah, but the evidence on that on the second
5 night -- on the first night he says one, two, three, four, and you sort of ask: Is that
6 progressive? On the second night, does -- he goes one, two, three, four, so --
7
- 8 MR. BOTTOS: Yes, he does.
9
- 10 MADAM JUSTICE MARTIN: So --
11
- 12 MR. BOTTOS: In fact, that's when we get into the one, two,
13 three, four, is number two -- night number two.
14
- 15 MADAM JUSTICE MARTIN: Are you sure?
16
- 17 MR. BOTTOS: I'm pretty sure.
18
- 19 MADAM JUSTICE MARTIN: Am -- but we can --
20
- 21 MR. BOTTOS: Because we spent less time on night number
22 one only because it -- it was the precursor for night number two. But night number two,
23 we slowed down the evidence, and he went through it step by step, and he said one, two,
24 three, four over the course of about ten minutes.
25
- 26 MR. JUSTICE WATSON: You see, one -- one of the things, of course,
27 that -- well -- as the Chief Justice has pointed out about consent, the jury didn't
28 understand that consent meant voluntary agreement to the sexual activity, not some notion
29 of consent, whatever the jury might have thought consent was.
30
- 31 MR. BOTTOS: With respect, I think that's in there. I can't
32 give you the page number right now, but I think he defines it.
33
- 34 CHIEF JUSTICE FRASER: And to the sexual activity in question. So
35 we're back to the --
36
- 37 MADAM JUSTICE MARTIN: To the type of activity, is what he says.
38
- 39 CHIEF JUSTICE FRASER: -- type of -- not what the type is, but it's the
40 degree of force used. And when you have the -- the argument here that's being put, and
41 that's what your friend has put, is when you have moans and groans and they are

1 ambiguous in terms of what they mean --
2
3 MR. BOTTOS: They're -- you're saying it's ambiguous. He's
4 saying --
5
6 CHIEF JUSTICE FRASER: Well, there are -- you're saying: Well, moans
7 and groans --
8
9 MR. BOTTOS: -- that it was clear -- clear signs of pleasure.
10
11 CHIEF JUSTICE FRASER: -- can be ambiguous. And so the point is,
12 you're saying your client said -- I think your exact words yesterday: What's a man to do?
13
14 MR. BOTTOS: Yes.
15
16 CHIEF JUSTICE FRASER: Ask.
17
18 MR. BOTTOS: No.
19
20 CHIEF JUSTICE FRASER: Okay. Is there an issue with that point?
21
22 MR. BOTTOS: You don't have to ask. You don't have to ask.
23 You don't have to verbalize: May I -- I know you're here for a commercial transaction,
24 but do I -- you don't have to ask every step of the way.
25
26 CHIEF JUSTICE FRASER: Well, you do if you're taking your fist and
27 punching it into somebody's vagina. Okay? And you're hearing moans and groans.
28
29 MR. BOTTOS: That's not what *Ewanchuk* says.
30
31 CHIEF JUSTICE FRASER: So maybe at that point -- well, you --
32
33 MR. BOTTOS: *Ewanchuk* said words or conduct. In fact, you
34 said, in the Court of Appeal --
35
36 CHIEF JUSTICE FRASER: Yes?
37
38 MR. BOTTOS: -- you had to say yes or she -- you had to get a
39 yes, and then -- and then Justice Major said: To that, I would add by conduct as
40 well. And it's the conduct here.
41

- 1 CHIEF JUSTICE FRASER: I agree, but the conduct --
2
- 3 MR. BOTTOS: Body language --
4
- 5 CHIEF JUSTICE FRASER: -- the conduct of moans and groans when
6 you're punching a fist into somebody's vagina might cause, one would say --
7
- 8 MR. BOTTOS: He wasn't --
9
- 10 CHIEF JUSTICE FRASER: -- on a reasonable basis, an observer to say --
11 as I believe Dr. Dowling said -- someone would say: Watching that, you're going to
12 hurt -- you are hurting this person. When you hear the moans and groans, as you're
13 shoving a big hand into a vagina with four fingers, and you're, in effect, using this, what
14 is described as a fisting motion, and punching with enough force that you tear an 11
15 centimeter tear in the vagina, and you hear moans and groans, someone might say: You
16 know what? A reasonable step at that point would be to say: Am I hurting you? Is
17 this okay?
18
- 19 MR. BOTTOS: He heard the moans and groans as indicative of
20 pleasure. He never said --
21
- 22 CHIEF JUSTICE FRASER: I understand that.
23
- 24 MR. BOTTOS: He never said that he had -- it was equivocal to
25 him, and at the same time, she is fellating him. These are all positive signs, and we can't
26 take judicial notice of the fact that she's a prostitute and, therefore, not really wanting to
27 consent, and she just wants to get it all over with fast and all that.
28
- 29 CHIEF JUSTICE FRASER: Okay. I think that we've probably gone
30 through enough of this in terms of the reasonable steps. I take it that the reasonable
31 steps -- I asked this yesterday -- had been discussed at the time to decide whether there
32 was an air of reality or was it? Did anybody make an argument that there was no air of
33 reality here?
34
- 35 MADAM JUSTICE MARTIN: No, the Crown --
36
- 37 CHIEF JUSTICE FRASER: No. The Crown conceded there was an air of
38 reality.
39
- 40 MS. DARTANA: It was never discussed, because the --
41

- 1
2 MADAM JUSTICE MARTIN: No, but I'm --
3
4 MR. BOTTOS: But that doesn't mean that he knew that she
5 was not consenting.
6
7 MADAM JUSTICE MARTIN: No. I'm talking consent. I agree with you. Was
8 it callous? Yes. Was it unfair? Yeah. But does that have any evidentiary connection with
9 what that consent -- if he says it existed to -- like, I'm finding I can't really think about
10 that clearly, and so I'm not asking you to set a trap. I'm asking you because I'm having
11 trouble figuring out what that might be and what that might suggest about anything. And
12 maybe the answer is nothing, but I'm going to let you think about it, because I have been
13 thinking about it and I can't come to a spot.
14
15 MR. BOTTOS: So, just to be clear --
16
17 MADAM JUSTICE MARTIN: Yeah.
18
19 MR. BOTTOS: -- are you asking to address whether his
20 after-the-fact breach of contract could now ex post facto determine lack of consent on her
21 part?
22
23 MR. JUSTICE WATSON: No, no.
24
25 MADAM JUSTICE MARTIN: No.
26
27 MR. JUSTICE WATSON: Shed some light on his understanding of what
28 the consent was.
29
30 CHIEF JUSTICE FRASER: Understanding what the contract was.
31
32 MR. BOTTOS: Oh, okay.
33
34 CHIEF JUSTICE FRASER: Well, that's what it is. I mean, that's what My
35 Lady Martin is asking, is what was the contract? And his statement, I'm not paying you
36 for what we just did certainly calls into question what he understood the contract to be,
37 because he wasn't prepared to pay for what had just happened.
38
39 MR. BOTTOS: Well --
40
41 CHIEF JUSTICE FRASER: So that's one issue. Can I leave another one

- 1 that -- I asked about the post-conduct in the context of charging and saying you could use
2 that for accident but not for anything else. And I asked Ms. Dartana whether that was
3 correct in law. I'd like you to address that, if you wouldn't mind, Mr. Bottos. I'm sure
4 that you can find that for us.
5
- 6 MR. BOTTOS: Can you just -- I'm sorry.
7
- 8 CHIEF JUSTICE FRASER: That was the post-offence conduct provision.
9
- 10 MR. BOTTOS: Right. Okay.
11
- 12 CHIEF JUSTICE FRASER: Where there was a suggestion made by the
13 judge that you could take into account the post-offence conduct to find that it was an
14 accident, but you couldn't take it into account to convict him of an offence. And I'm just
15 basically saying, is that really correct, or are both wrong? And can you only use it for
16 purposes of credibility?
17
- 18 MR. JUSTICE WATSON: Your friend mentioned *Jaw*, so --
19
- 20 CHIEF JUSTICE FRASER: Yeah. And then one other thing that we have
21 not discussed today but I just want to be sure that both of you have a chance to address
22 that, and that is, if mistake of fact -- pardon me. If consent is vitiated for public policy
23 reasons where serious bodily injury -- let me rephrase that. If consent is vitiated for public
24 policy reasons where death results, is mistake of fact alive at all as any kind of defence?
25 So if you have a case where a consent is vitiated as a matter of law, is there any room
26 left for mistake of fact as a defence?
27
- 28 MR. JUSTICE WATSON: Because -- or else does it come -- turn itself
29 into an error of law?
30
- 31 MADAM JUSTICE MARTIN: Right. So the question, then, you're asking is if
32 the fist fighters can't do it, can you say, oh, I --
33
- 34 CHIEF JUSTICE FRASER: I had a mistaken belief in consent.
35
- 36 MADAM JUSTICE MARTIN: I reasonably believed and honest believed he
37 was consenting?
38
- 39 CHIEF JUSTICE FRASER: I think the answer is no, but I'm just putting
40 that to both of you. If it -- you know, is mistake of fact as the defence dead once you say
41 that consent is vitiated as a matter of law --

1

2 CHIEF JUSTICE FRASER:

Okay. We've got that, Mr. Bottos.

3

4 MR. BOTTOS:

5 So -- pardon me. To acknowledge a couple of
6 errors that the trial judge did make. Justice Watson, you said that the reasonable inference
7 was placed in the context of the first degree murder charge. We looked at that, and we
8 see that that is the case, but he does -- although it's in that section, he does discuss it as a
9 reasonable inference at large. He doesn't say only for the murder charge. He just makes
10 the one sentence. So we agree that it was in the section under first degree murder. Not
11 repeated. However, on balance, I suggest, respectfully, that the jury was still told that
12 there is a general reasonable inference -- a permissible one -- that a person intends the
13 natural consequences of his actions.

13

14 Secondly, the other question that the panel asked about last night, which was the post
15 offence conduct, and we reviewed that, and we compared it to the Watt's criminal manual
16 on jury charges, and the trial judge got everything right, I think, except one sentence,
17 which he added and misspoke, because he -- he goes through the charge -- and this is
18 starting at 1742. But he provides the charge on post offence conduct, quite detailed and --
19 and extensively, but then he says at 1742 -- well, three things, and I ask -- I urge you to
20 take this in context. Firstly, he says:

21

22 You must not infer Mr. Barton's guilt from after-the-fact conduct
23 unless, when you consider it along with all of the other evidence,
24 you are satisfied that it is consistent with his guilt and inconsistent
25 with other -- with any other reasonable conclusion.

26

27 So there, he is talking about, there is post offence conduct that might infer guilt.

28

29 This -- then he makes his mistake at the next sentence.

30

31 You cannot infer that Mr. Barton is guilty of any offence as a
32 result of his after-the-fact conduct, but may be used to assess his
33 claim that Cindy Gladue's injury was an accident.

34

35 What we suggest he meant to say was: You cannot infer from that alone. That is to say,
36 you cannot infer guilt from this post offence conduct alone, with nothing else, and -- but
37 then he returns to the fact that post offence conduct is indicative of guilt in the next
38 paragraph.

39

40 Also keep in mind that evidence of after-the-fact conduct has only
41 an indirect bearing on the issue of Mr. Barton's guilt. You must

1 be careful about inferring his guilt from this evidence, because
 2 there might be other explanations for this conduct. You may use
 3 evidence of after-the-fact conduct to support an inference of guilt
 4 only if you have rejected any other explanation for this conduct.
 5

6 So in --
 7

8 CHIEF JUSTICE FRASER: And then -- you say this is per -- per *Watt*.
 9 Next page, 1743 line 18. I have a big X beside this:

10
 11 This evidence might only be used to draw an inference relating to
 12 Miss Gladue's injuries being accidental.
 13

14 So now we're saying we -- it can be used to support his version of innocence.
 15

16 You can't use this evidence to draw any conclusion as to which of
 17 the available offences he may be guilty of, but it can't be used for
 18 guilt.
 19

20 So --
 21

22 MR. BOTTOS: I'm sorry. Did he say -- which --

23
 24 CHIEF JUSTICE FRASER: I'm sorry. Is that from *Watt*?

25
 26 MR. BOTTOS: No. Could you refer to the line number?

27
 28 MR. JUSTICE WATSON: It's at 18 to --

29
 30 CHIEF JUSTICE FRASER: Lines 18 to 20 on page 1743. I referred to
 31 them yesterday as well, because I wanted to know whether it was appropriate to say you
 32 could use the inference for accident, but you can't -- you could use the evidence to infer
 33 accident, but you can't use the evidence to infer guilt.
 34

35 MR. JUSTICE WATSON: For example, could you not use the evidence to
 36 infer sexual assault?

37
 38 MR. BOTTOS: I'm just reading that now.
 39

40 CHIEF JUSTICE FRASER: I just really wanted to know whether that was
 41 in *Watt*, because you made a point of saying this was in the standard jury charge, and

1 what I wanted to know was whether what was said on page 1743 is in the standard jury
2 charge.

3
4 MR. BOTTOS: Yes. No, that's not in the standard jury charge.
5 And I would just follow that up with -- that that was not so egregious a breach or
6 egregious an error as to upset the wholeness of his charge on after-the-fact conduct.
7 Because, remember, in this case, there was a very likelihood that Mr. Barton was cleaning
8 up and running away scared for about 20 minutes and then getting arrested in the next
9 hour. Not necessarily because he killed anyone, not necessarily because he felt that he
10 was found out for a crime, but because simply he was found with a dead prostitute in his
11 bathtub, and that, in itself, would have been reason for him and, as I suggested or urged
12 the jury to consider, as the real reason why he was lying to everybody in that first hour of
13 the investigation, which is to say, his post offence conduct could have arisen from
14 guilty -- a guilty conscience or it could have been arising from fear and innocent -- that
15 is, criminal -- innocent criminal -- sorry -- conduct innocent of criminal conduct or
16 consciousness of mere being found with a prostitute dead in your -- in your tub.

17
18 So -- and I just want to harken -- refer to one case that we don't -- we didn't have yet,
19 that we found last night, and that's the case of *Araya* 2015 Supreme Court, and that has to
20 do with the functional and contextual approach that governs appellate courts in their
21 review of jury instructions. And I'm not going to read it to you, but paragraph 39 is
22 pertinent if -- and I have three copies for the panel, subject to your permission. The
23 essence of it is though that --

24
25 CHIEF JUSTICE FRASER: Yeah.

26
27 MR. BOTTOS: -- at paragraph 39, the Court says that:

28
29 The appellate court must examine the alleged error in the context
30 of the entire charge. Some flexibility in crafting the language is
31 required. Perfection is not the standard.

32
33 CHIEF JUSTICE FRASER: Yeah.

34
35 MR. BOTTOS: And also the --

36
37 CHIEF JUSTICE FRASER: That's pretty consistent.

38
39 MR. BOTTOS: -- Court has emphasized that the charge
40 generally should not be endlessly dissected and subjected to minute scrutiny and
41 criticism. So I would leave that for the Court to consider.

1 But if you read the charge and see how confusing and misleading it is, you can see how a
2 jury could have acquitted.

3
4 The Crown submits that the most significant error in the charge was that the jury was not
5 given all of the possible mens rea for manslaughter and for a sexual assault causing bodily
6 harm, which was the underlying unlawful act in this case; therefore, they were not given
7 all of the paths to conviction. The jury was only --

8
9 CHIEF JUSTICE FRASER: Okay. Just before you go on, conviction for
10 what? Because one of the primary arguments that your friend has made here is that your
11 grounds of appeal are sufficiently limited that if we were to allow the appeal, the only
12 retrial would be for manslaughter and not first degree murder -- or murder; pardon me.

13
14 MS. DARTANA: Yes. And with respect to the first grounds I
15 would submit that that would only go to a manslaughter conviction. The third ground, if
16 you find that's persuasive, that would go to conviction for first degree murder and for
17 manslaughter.

18
19 CHIEF JUSTICE FRASER: You are talking about motive?

20
21 MS. DARTANA: I'm sorry. The fourth ground, yes. The second
22 and the third deal with the prior sexual activity and the honest but mistaken belief in
23 consent.

24
25 CHIEF JUSTICE FRASER: M-hm.

26
27 MS. DARTANA: Which I argue together. That's why in my
28 mind it's the second ground. But, yes, I'm talking about the motive ground.

29
30 CHIEF JUSTICE FRASER: So you are saying the only one that would get a
31 new trial on murder would be allowing the appeal on the motive issue?

32
33 MS. DARTANA: That's correct.

34
35 Now, the jury here was only given the subjective mens rea of an intention to cause bodily
36 harm. They were not given the objective mens rea of the objective foreseeability of the
37 risk of bodily harm. That omission would have impacted the verdict because it would
38 have made a real difference in this case because there was actual evidence of objective
39 foreseeability of the risk of bodily harm, and that was in Dr. Dowling's evidence. And I
40 will --

41

1

2 CHIEF JUSTICE FRASER: Thank you.

3

4 MR. JUSTICE WATSON: In so saying, Mr. Bottos, we're recognizing
5 that, especially at my age, after a certain period of time in the day, as the Chief Justice --
6 the late Chief Justice McGillivray used to say, all physical features cease to operate at
7 premium efficiency.

8

9 MR. BOTTOS: Well, My Lord, I was worn out, and I haven't
10 said a thing today, so --

11

12 MR. JUSTICE WATSON: Yeah. Oh, by the way, I suppose we should add
13 that you will, needless to say, have an opportunity to write supplemental factum too.

14

15 MR. BOTTOS: I appreciate that.

16

17 MR. JUSTICE WATSON: Yeah.

18

19 CHIEF JUSTICE FRASER: Depending on what it is we want to hear from
20 both of you on, if anything.

21

22 MR. JUSTICE WATSON: Yeah.

23

24 CHIEF JUSTICE FRASER: We'll wait and see.

25

26 MR. BOTTOS: Yes.

27

28 CHIEF JUSTICE FRASER: Mr. Bottos, maybe you could start with the
29 murder issue that was raised in terms of the Crown's position on the issue of whether, on
30 any of these grounds, a new trial would be warranted in any event on the murder charge.

31

32 Submissions by Mr. Bottos

33

34 MR. BOTTOS: Well, I admit, to be candid, Chief Justice, that
35 the first three grounds of my friend's argument go only to obtaining a new trial on
36 manslaughter, but the issue of motive is a issue of general application to both the offence
37 of first-degree murder in this case and manslaughter. So, to be frank, if there was an error
38 in law and the trial judge did not appropriately use his discretion on motive, then that
39 could go to reordering a new trial on first-degree murder.

40

41 My respectful submissions is, of course, though, that, according to *Lewis*, this case fell

1 within the middle of the bell curve, if you might call it that.

2

3 MR. JUSTICE WATSON: Perhaps I could — Mr. Bottos, you're very
4 experienced counsel, so I don't think you mind us engaging. You certainly haven't in the
5 past. One of the interesting things about the motive point is that, in addition to the
6 objection made in law about the motive point, it's also constructed on a framework of the
7 respondent's evidence. In other words, the — it's almost as if the respondent's best case is
8 translated through the motive. In other words, would he have a motive to do, you know,
9 the worst version of what the Crown says?

10

11 Is that not also problematic on the question of intention? Because, after all, if the jury
12 made a finding of fact that the scenario was different from what the respondent said it
13 was, in other words, had a different link for why he's in the truck for 20 minutes and why
14 he's falling asleep leaving his wallet out and all this kind of stuff, in other words, if the
15 jury had filled in the gaps in a different way than what was taken here, motive would
16 become even more crucial as a mistake; would it not?

17

18 MR. BOTTOS: I'm sorry. As a mistake?

19

20 MR. JUSTICE WATSON: In other words, a mistake to put motive to the
21 jury if, in fact, the transaction — if the only — because what the jury is saying, there's no
22 evidence of motive on the respondent's transaction. If there was not — if the jury did not
23 find the respondent's transaction to be the real world, they found something else, then the
24 Crown's argument, don't put motive there, would be even stronger; would it — would it
25 not?

26

27 MR. BOTTOS: Well, with respect, Sir, the jury was not told
28 you can only find absence of motive based on the accused or the respondent's
29 evidence. The Crown — the theory of motive or lack thereof touched on whether he
30 intentionally used a knife on her vaginally or whether he intentionally harmed her with his
31 fist or his hand. So it goes to both. It was not just on his version, therefore, that motive
32 would be left, because the jury could, in fact, have said, well, maybe he stabbed her, but
33 there was no motive here, there was no weapon here found, there was no sounds of
34 violence or distress, and, yeah, the defence raises a good point. Why would he kill her?
35 Everyone knows he's down there in that room 139. There's no motive for him to have
36 intentionally murdered this woman with a knife.

37

38 So it goes to murder, and it does go to manslaughter, and it wasn't just based on his
39 version of the events, because the Crown is saying, you know, bologna to you using your
40 hand, you used a knife. And so the defence is saying you got to look at everything, all of
41 the circumstances.